

**City of Des Moines, Iowa  
January 31, 2013 Administrative Hearing**

**In re:**

JEANNE ZEITLER,  
JAMES LOVELAND and  
ERIC RANDALL,  
Appellants

DECISION AND ORDER  
AND  
NOTICE OF RIGHT TO APPEAL

**Introduction and Parties**

This is a hearing on an appeal from an encroachment violation notice. Attorney Charles A. D. Hill with Iowa Legal Aid appeared for the appellants. SuAnn Donovan, Zoning Enforcement Neighborhood Inspection Administrator with the City of Des Moines Community Development Department and Des Moines Assistant City Attorney Roger K. Brown appeared for the City of Des Moines (the "City").

**Background**

On January 17, 2013, the City posted notices at several area homeless encampments citing Section 102-615 the Municipal Code of the City of Des Moines, Iowa (the "Code"). One such notice was posted at an encampment located under the Martin Luther King Parkway Bridge and next to the Racoon River, where appellants reside in tents. The notice stated that the appellants are in violation of Code Section 102-615 "by encroaching (living/residing and storage of personal property) on City of Des Moines property." It also stated that the appellants must remove their personal property from this location before Tuesday, January 29, 2013 "or it will/may be removed and disposed of" by the City. The notice went on to warn: "Any unauthorized persons remaining or entering upon the public lands identified on Tuesday, January 29th, 2013, may be subject to immediate forcible removal an/or [sic] arrest." The notice states that the appellants were not to relocate to any other City of Des Moines property. The notice included an aerial photo with street names labeled and a circle marked around the Martin Luther King Jr. Parkway bridge. It also informed appellants of their right to contest the notice by filing a notice of appeal with the City Clerk by January 28, 2013. Additionally, the notice directed appellants to contact the office of Community

Development of the City of Des Moines if they had any questions, and gave the name of SuAnn Donovan with her contact address and phone number. Appellants and their attorney gave notice of their appeal at the City Clerk's office, and a hearing was set for January 31, 2013 at 9:30. The matter was so heard before the Administrative Hearing Officer.

### **Discussion**

An encroachment is something which intrudes into public space, and has been defined under City Code Section 102-596: "[I]n addition to its usual meaning, [an encroachment] means any architectural projection, chimney, stairway, platform, step, railing, door, grate, vault, sign, banner, canopy, marquee, awning, newsrack, trash container, bench, areaway, obstruction, opening or structure." Code Section 102-605 states that encroachments onto city property may only be constructed, used or maintained upon or over the surface of any public property with a written license or lease obtained from the City under Article VIII of the Code. On December 7, 2012 the City's encroachment ordinance was amended to add "any tent or other material configured or used for habitation or shelter..." to the definition of things which constitute an "encroachment" under Code Section 102-596. Encroachments without the required license or lease are subject to removal under Code Section 102-615. Chapter 3 of the Code which sets out the City's administrative hearing process was also amended December 7, 2012 to restrict a hearing on appeal from a threatened removal action by the city:

#### **Sec. 3-23. Limitations on hearings.**

The hearing on an appeal from a decision made by a city official pursuant to the Code sections listed below shall be subject to the following restrictions and limitations:

...

##### **(2) Section 102-615. Removal of encroachments.**

The sole issue before the administrative hearing officer shall be whether the removal of the encroachment by the city was properly authorized pursuant to Article VIII of Chapter 102 of this Code. If it is determined that the removal was not properly authorized pursuant to Article VIII of Chapter 102 of this Code, or if the appellant alleges that the removed property was improperly disposed of by the city, the administrative hearing officer shall refer the matter to the city attorney for further consideration and processing as a claim against the city.

The City followed its own, newly amended ordinance in noticing the homeless individuals residing in encampments on public property. The notice posted by the City strictly adhered to the requirements of Code Section 102-615(b). In addition, Code

Section 102-615(c) allows immediate removal of an encroachment, without notice, if it "unreasonably endangers the safety of persons or property...." The City presented substantial evidence demonstrating the dangers inherent in a homeless encampment such as the one here in issue. Tom Patava, Fire Marshal with the City of Des Moines Fire Department, testified that his department is 20 times more likely to respond to a fire at a homeless camp as compared to a fire at a private residence. The lack of proper sanitation, the accumulation of junk and debris, open pit fires and propane tanks used for heating inside tents and cooking, all contribute to the unsafe conditions existing in the homeless camps. The homeless camps do not offer an even basic level of safety that is normally required for any residence according to testimony by Cody Christensen, Deputy Building Official in the Community Development Department for the City of Des Moines.

The City presented descriptions of the ways in which the homeless encampments are in violation of a multitude of other city ordinances, including the nuisance ordinances, a bonfire prohibition, and building and fire codes to name a few. These ordinances were not in issue in this case, however, as the sole ordinance cited by the city in its notice to the homeless camp inhabitants was Code Section 102-615. Reference to these ordinances does, however, support the city's contention that the conditions at the homeless camps are unsafe.

The brief submitted by the appellants' attorney raises several objections to the City's actions. This brief and the arguments advanced by Appellant's counsel show that Mr. Hill was not aware of the newly passed ordinance amendments. His objections that the City's actions were ultra vires, that the notice was confusing and vague, that the notice was lacking the contact information for the city engineer, etc., are not applicable given the amendments of which counsel was obviously unaware.

Appellant's attorney additionally raises the affirmative defenses of necessity and laches. The defense of necessity is a defense to liability for unlawful activity where the conduct cannot be avoided and one is justified in the particular conduct because it would prevent the occurrence of a harm that is more serious. The Assistant City Attorney responded to Appellants' attorney's defense of necessity argument by submitting a copy of an Iowa Supreme Court case, *State v. Walton*, 311 N.W.2d 113 (Iowa 1981), and dismissing the defense as inapplicable, stating, "It really doesn't fit. I don't think it deserves more discussion than that." Several courts across the country disagree with this opinion, applying the defense of necessity to violations of ordinances similar to the one here in issue. See, e.g., *In re Eichorn*, 81 Cal. Rptr. 2d 535, 539-40 (Cal. Ct. App. 1998), (California Court of Appeal held that a homeless defendant may raise a necessity defense to violation of a municipal anti-camping ordinance); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1155 (Cal. 1995) (necessity defense might be available to persons who have no alternative to "camping" on private property); *Jones v. City Of Los Angeles*, 444 F.3d 1118 (9<sup>th</sup> Cir. 2006) (acknowledging the potential

availability of a necessity defense for citizens charged with an ordinance prohibiting sitting, lying, or sleeping in public spaces).

The Iowa Supreme Court recognizes the defense of necessity in Iowa (*Walton*, 311 N.W.2d at 114), although it has not specifically applied it to a case involving homeless camps. For guidance in determining whether the defense might apply in a given situation, the Court in *Walton* stated:

At least one commentator has suggested the following factors as a framework for analysis where the defendant is not personally at fault in creating the situation calling for the necessity to make a selection: (1) the harm avoided, (2) the harm done, (3) the defendant's intention to avoid the greater harm, (4) the relative value of the harm avoided and the harm done, and (5) optional courses of action and the imminence of disaster.

*Walton*, 311 N.W.2d at 115 (Iowa 1981), citing W. LaFave & A. Scott, Handbook on Criminal Law, s 50, at 385-88. (1972). The Court goes on to explain:

The necessity defense does not apply except in emergency situations where the threatened harm is immediate and the threatened disaster imminent. The defendant must be stripped of options by which he or she might avoid both evils.

*Walton*, 311 N.W.2d at 115. During the hearing, Deirdre Henriquez, Program Manager for the Advocacy Department at Primary Health Care Outreach, testified that she has been working with the homeless population in and around Des Moines since May 2001. She stated that the number of beds at the Central Iowa Shelter and Services was 100 for single men and 50 for women. The occupancy a couple of nights before the hearing was 174, with more expected due to the extreme cold. She testified that the overflow sleep on benches, sitting up.

Obviously, taking the tents away from the homeless people living in the encampments would leave them without protection from the elements, exposing them to extreme cold and threatening their lives. With no shelter beds available, this would also deprive these people of the basic necessity of adequate sleep. People do not sleep sitting up. The defense of necessity operates in this case to justify the appellants' lack of a license or lease for their encroachment. The harm avoided is greater than the harm done, where the threats of sleep deprivation and freezing to death are greater than the general unsafe conditions of the homeless camps. There do not appear to be any other options for these people. As Eric Randall, one of the homeless Appellants, stated during his testimony, he is not homeless by choice.

As the necessity defense would render removal of Appellants' property unauthorized under the circumstances presented in this case, this matter must be referred to the City Attorney for further consideration and processing as a claim against the City pursuant to City Code Section 3-23(2). The merits of the Appellants' other arguments, including the laches and constitutional arguments, need not be determined at this time.

### **Decision and Order**

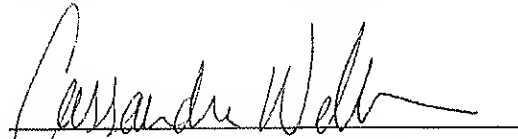
By a preponderance of all the evidence in the record it is found that a defense of necessity has been established and that removal of Appellants' property is not properly authorized.

This matter is referred to the City Attorney for further consideration and processing as a claim against the City pursuant to City Code Section 3-23(2).

### **Right of Appeal**

This decision and order may be submitted for judicial review by filing an appropriate action in Polk County District Court within 30 days of the date of this ruling.

This written ruling is submitted on this 11<sup>th</sup> day of February, 2013 in Des Moines, Polk County, Iowa. The City Clerk shall serve copies of this Decision and Order upon each of the parties.

  
Cassandra Webster  
Administrative Hearing Officer



February 11, 2013

Jeanne Zeitler  
James Loveland  
Eric Randall  
c/o Charles A. D. Hill  
Iowa Legal Aid  
1111 9<sup>th</sup> Street, Suite 230  
Des Moines, IA 50314

Re: Encroachment Violation

Attached is the ruling from the City of Des Moines Hearing Officer, for the Administrative Hearing on January 31, 2013. Please read it carefully, so you are aware of the decision, any deadlines you might be required to comply with, as well as any other requirements you may be held to.

Sincerely,

A handwritten signature in cursive script that reads "Diane Rauh".

Diane Rauh  
City Clerk

DR:kh  
Attach